TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~201~~ 71

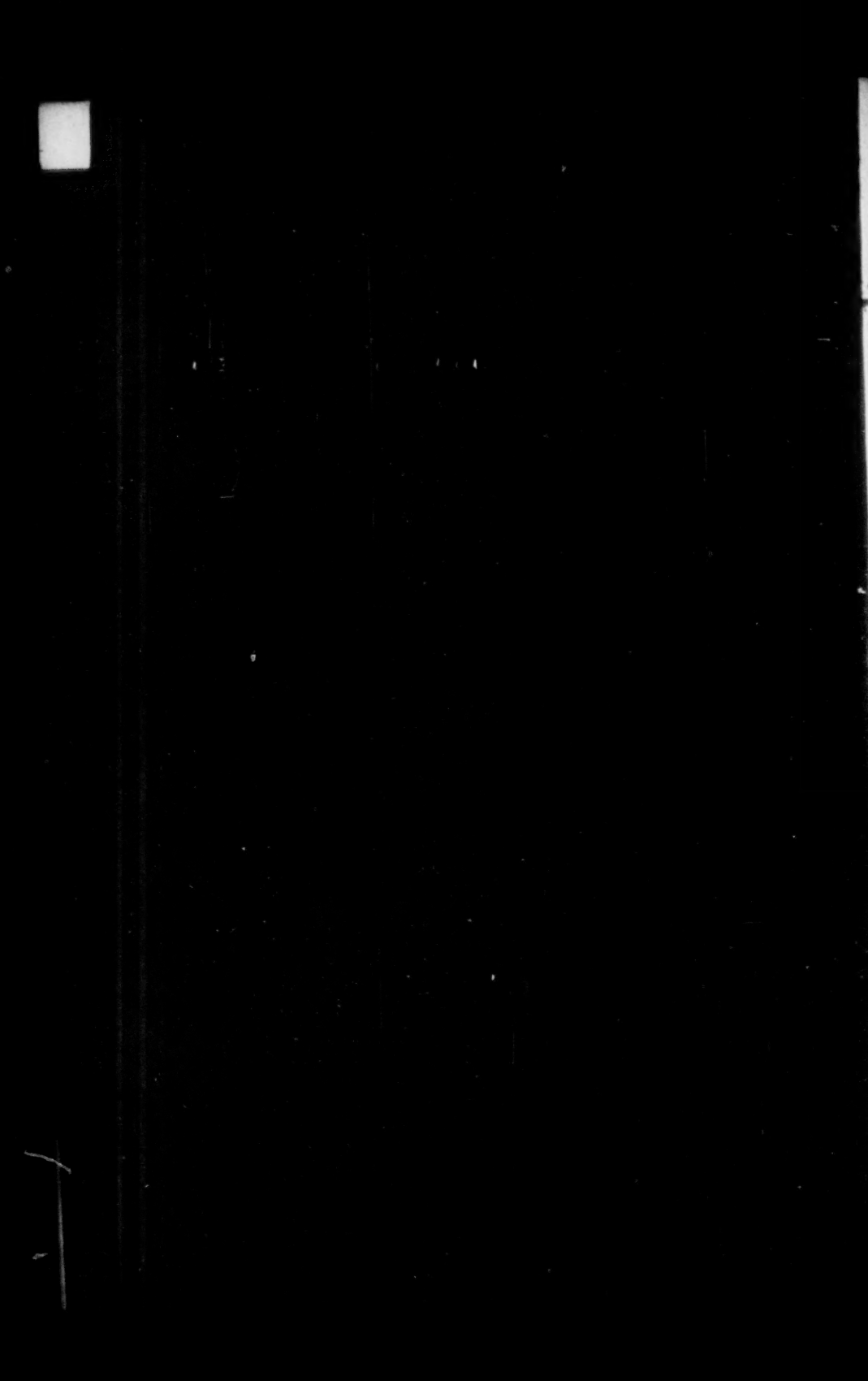
JAMES F. PENDERGAST, CHARLES H. PENDERGAST, AND HENRY A. FENWICK, APPELLANTS,

vs.

THE OWNER AND CLAIMANT OF THE STEAMER GENERAL CUSTER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED SEPTEMBER 30, 1869.



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SUPREME COURT OF THE UNITED STATES.

No. 261.

JAMES F. PENDERGAST, CHARLES H. PENDERGAST, AND HENRY A. FENWICK, APPELLANTS,

vs.

THE OWNER AND CLAIMANT OF THE STEAMER GENERAL CUSTER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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1 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a circuit court of the United States for the fourth circuit, in and for the Maryland district, begun and held at the city of Baltimore on the first Monday in November, (being the second day of the same month,) in the year of our Lord one thousand eight hundred and sixty-eight—present, the Honorable S. P. Chase, Chief Justice of the Supreme Court of the United States; A. S. Ridgley, esquire, attorney; Washington Bonifant, esquire, marshal; James W. Chew, clerk—among other, were the following proceedings, to wit:

OWNER AND CLAIMANT OF STEAMER GENERAL Custar
vs.
JAMES F. PENDERGAST, CHARLES H. PENDERgast, & Henry A. Fenwick.

Be it remembered that heretofore, to wit, on the 26th day of January, in the year of our Lord 1867, the said owner and claimant of the steamer General Custar, by Robert J. Brent and Joseph L. Brent, esquires, their proctors, filed in the circuit court here the transcript of a record from the district court of the United States in and for the Maryland district, in the words and of the tenor following, to wit:

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

2 At a district court of the United States in and for the Maryland district, begun and held at the city of Baltimore, on the first Tuesday of December, (being the fourth day of the same month,) in the year of our Lord one thousand eight hundred and sixty-six:

Present, the Honorable William F. Giles, judge Maryland district; William Price, esquire, attorney; Washington Bonifant, esquire, marshal; James W. Chew, clerk.

Libel.—Filed August 31st, 1866.

JAMES F. PENDERGAST, CHARLES H. PENdergast, & Henry A. Fenwick
vs.
STEAMER GENERAL CUSTAR.
} Libel.—In admiralty.

[U. S. 50-cents int. rev stamp.]

To the Honorable William F. Giles, judge of the district court of the United States for the district of Maryland:

The libel of James F. Pendergast, Charles H. Pendergast, & Henry A. Fenwick, merchants, of the of Baltimore, State of Maryland, against the steamer "General Custar," her boats, tackle, apparel, & furniture, now lying in the port of Baltimore, in the district aforesaid, within the admiralty & maritime jurisdiction of this honorable court, & against all persons who may lawfully intervene for their in-
3 terest therein, in a cause of contract civil & maritime, alleges & articulately propounds as follows, to wit:

First. That said steamer being in the port of Baltimore, & needing repairs & supplies to enable her to proceed on her voyage to sea, the libellants, at the request sometimes of her master, & sometimes of her

owners, advanced and paid for such necessary repairs & supplies, the sum of seventeen thousand five hundred and ninety-seven dollars & seventy-four cents, in various sums and at various times, more specifically stated in the schedule hereunto annexed.

Second. That at the times of said advances, the said steamer was a foreign steamer, & did not belong to any resident or citizen of the State of Maryland, & it was impossible to procure said repairs & supplies, or the money therefor, except upon the credit of said steamer.

Third. That said advances were made by the libellants upon the credit of said steamer, as well as on that of her master and owners.

Fourth. That the sum of sixty-three hundred and eighteen dollars and sixty-six cents, with proper interest thereon, remains due & unpaid to the libellants on account of the advances aforesaid, as will appear by the schedule hereinbefore referred to, & that said balance is a lien on said steamer.

Fifth. That all & singular the premises are true, & within the admiralty & maritime jurisdiction of this honorable court.

Wherefore the libellants pray that process in due form of law may issue against the said steamer "General Custar," her boats,
4 tackle, apparel, & furniture, & against all persons lawfully intervening for their interest therein, & that this honorable court will pronounce for the aforesaid demand of the libellants, & decree the same to be paid, with costs, & grant to the libellants such other & further relief as their case may require.

JOHN H. THOMAS,
Proctor for Libellants.

SCHEDULE.

Steamer "General Custar" & owners in acc't with Pendergast, Fenwick & Co.

DR.

1866.					
March	21.	To cash paid	350		
	24.	" " "	328	56	
	26.	" " "	16	77	
	27.	" " "	85	55	
	28.	" " "	283	73	
	28.	" " "	9	25	
	28.	" " "	35	25	
	31.	" " "	101	82	
					1,210 92
April	2.	" " "	20	00	
	4.	" " "	704	51	
	7.	" " "	178	67	
	9.	" " "	2	20	
	10.	" " "	383	83	
	11.	" " "	5	50	
	12.	" " "	13	70	
	13.	" " "	64	50	
5	14.	" " "	201	60	
	16.	" " "	13	25	
	16.	" " "	267	22	
	19.	" " "	6	25	
	20.	" " "	63	64	

	21.	"	"	"	20 81	
	23.	"	"	"	12 22	
	24.	"	"	"	459 60	
	25.	"	"	"	54 67	
	26.	"	"	"	19 90	
	27.	"	"	"	22 95	
	27.	"	"	"	277 12	
	28.	"	"	"	165 77	
	30.	"	"	"	25 75	
	30.	"	"	"	67 50	
						3,051 18
				Forward		4,262 10
				To amount brought forward		4,262 10
May	1.	"	cash paid		626 74	
	3.	"	"	"	12 25	
	4.	"	"	"	612 75	
	5.	"	"	"	87 03	
	7.	"	"	"	855	
	8.	"	"	"	62	
	7.	"	"	"	439 28	
	9.	"	"	"	361	
	10.	"	"	"	60	
	11.	"	"	"	7 50	
	12.	"	"	"	896 62	
	12.	"	"	"	222	
6	15.	"	"	"	20 90	
	19.	"	"	"	132 96	
	19.	"	"	"	33 75	
	21.	"	"	"	2 50	
	22.	"	"	"	126 03	
	23.	"	"	"	345	
	23.	"	"	"	32 93	
	24.	"	"	"	17 75	
	25.	"	"	"	353 43	
	26.	"	"	"	44 66	
	26.	"	"	"	291 11	
	26.	"	"	"	108 60	
	29.	"	"	"	1 51	
	29.	"	"	"	2 15	
	31.	"	"	"	26 25	
	31.	"	"	"	100 00	
						5,822 60
June	2.	"	"	"	90 68	
	5.	"	"	"	43 17	
	6.	"	"	"	4	
						137 85
				Forward		10,222 55
1866.				To amount brought forward		10,222 55
June	8.	"	cash paid		12 92	
	9.	"	"	"	101 79	
	9.	"	"	"	42 85	

	11. " " "	267 06		
	14. " " "	543 51		
	15. " " "	1,182 44		
	16. " " "	103 68		
	18. " " "	38 06		
7	20. " " "	4 59		
	22. " " "	261 79		
	22. " " "	1 50		
	23. " " "	62 01		
	26. " " "	59 20		
	26. " " "	10 39		
	29. " " "	20		
	30. " " "	589 67		
	30. " " "	11 88		
	30. " " "	7		
	30. " " "	588 35		
	30. " " "	8 65		
				3,917 34
July	2. " " "	51 32		
	3. " " "	30		
	6. " " "	30		
	10. " " "	3 95		
	10. " " "	45 84		
	12. " " "	74 70		
	12. " " "	4 46		
	13. " " "	3		
	14. " " "	20		
	21. " " "	162 45		
				366 32
	Forward			14,506 21
	To amount brought forward			14,506 21
1866.				
July	25. " cash paid	10 60		
	28. " " "	15		
	31. " " "	21		
				46 60
Aug.	3. " " "	347 29		
	3. " " "	1 40		
8	4. " " "	2 15		
	8. " " "	10 50		
	11. " " "	1 20		
	14. " " "	375		
	16. " " "	25		
	22. " " "	282 39		
				1,044 93
				$15,597 74

1866. Cr.

March	24. By cash received		90
April	12. " " "	157 73	
	13. " " "	35	

	14.	"	"	"	2,000	
	20.	"	"	"	30	
	21.	"	"	"	1,500	
	23.	"	"	"	4 52	
	26.	"	"	"	35	
	27.	"	"	"	25	
	30.	"	"	"	1,256 25	
						5,043 50
May	3.	"	"	"	1,500	
	4.	"	"	"	26 84	
	6.	"	"	"	40	
	7.	"	"	"	5 21	
	12.	"	"	"	20 00	
						1,592 05
				Forward		6,725 55
1866.		By amount brought forward				6,725 55
May	12.	"	cash received		494 19	
	12.	"	"	"	95 94	
	21.	"	"	"	1 15	
	22.	"	"	"	9 35	
9	24.	"	"	"	1,525	
	26.	"	"	"	12	
	26.	"	"	"	1	
	29.	"	"	"	151 16	
						2,289 79
June	2.	"	"	"	5	
	4.	"	"	"	400	
	9.	"	"	"	100	
						505
						9,520 34
1866.		By amount brought forward				9,520 34
June	22.	"	cash rec'd		1,600	
	25.	"	"	"	45 74	
	26.	"	"	"	43	
						1,688 74
July	14.	"	"	"		70
				Forward		11,279 08
1866.		By amount brought forward				11,279 08
		"	balance			4,318 66
						$15,597 74
Aug.	23.	To balance due				4,318 66
July	18.	"	cash paid			2,000 00
		"	balance due			$6,318 66

E. & O. E.
BALTIMORE, *Aug. 23rd*, 1866.

Attachment.

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

To the marshal for the Maryland district, greeting:

10 We command you that you attach, seize, take, and safely keep steamer Gen'l Custar, her boats, tackle, apparel, & furniture, to answer the libel of James F. Pendergast, Charles H. Pendergast, & Henry A. Fenwick, in a cause of contract, civil & maritime; and how you shall execute this precept you make known to us in our district court for the district aforesaid, at the United States court-room in the city of Baltimore, on the fifteenth day of September next; and have you then and there this writ.

Witness the Honorable William F. Giles, judge of our said district court, this first Tuesday of June, in the year of our Lord one thousand eight hundred and sixty-six.

Issued 31st day of August, 1866.

JAMES W. CHEW,
Clk Dist. Ct.

Marshal's return.

Atta'd Sept. 1, 1866, in custody of sheriff.
W. BONIFANT, *U. S. Marshal.*

Answer.

PENDERGAST, FENWICK & CO. *vs.* STEAMER "GEN'L CUSTAR." } In admiralty.

To the Hon. William F. Giles, judge of the district court of the United States for the district of Maryland:

And now Thomas P. Morgan and George Rhinehart, of the district of Columbia, merchants, intervening for their interest in the
11 steamer "Gen'l Custar," appear before this hon. court, & for answer to the libel of said libellants against the said st'r "Gen'l Custar," her tackle, apparel, & furniture, & against all persons lawfully intervening for their interest in said steamer, allege & articulately propound as follows:

First. That these respondents are the lawful and only owners of the said st'r "Gen'l Custer" libelled as aforesaid.

Second. That the repairs & supplies, as in the said libel propounded, were not necessary repairs & supplies.

Third. That the advances for said supplies and repairs were not made on the credit of said steamer.

Fourth. That the alleged indebtedness of the said steamer, growing out of the schedule annexed to said libel & the balance claimed to be due thereon, did not arise or accrue in a cause of contract, civil & maritime, & that the said steamer cannot be charged therefore.

Fifth. That the said steamer is not indebted to the said libellants.

Sixth. That before the filing of the libel herein, the libellants had brought their action at common law for the same cause of action set forth in the libel herein & the schedule annexed thereto, against these respondents personally in the superior court of Baltimore City, State of

Maryland, & obtained therein a certain writ of attachment against the property of these respondents, which said writ was executed by the sheriff of Baltimore City taking into his possession, under the instructions of the said libellants, the said steamer "Gen'l Custer" libelled herein, and said action at common law is still pending & undecided.

Seventh. That all & singular the premises are true; in verifi-
12 cation whereof, if denied, these respondents crave leave to refer to proofs to be by them exhibited in this cause.

Wherefore these respondents pray that this hon. court would be pleased to pronounce against the libel aforesaid, & to condemn the libellants in costs, & otherwise right & justice to administer in the premises.

R. J. BRENT,
Proctor for Claimants.

Sworn to in open court before me this 12 December, 1866.

JA'S W. CHEW, *Clk.*

Claim.

In the United States district court.

PENDERGAST, FENWICK & Co.
vs.
STEAMER GENERAL CUSTER.

To the Hon. William F. Giles, judge of said court:

And now comes Thomas P. Morgan & George Rhinehart, owners of the steamer "General Custer," libelled by the libellants herein, & say & claim that they are the true & bona-fide owners of the said steamer, and that no other person is owner thereof.

R. J. BRENT,
Proctor for Claimants.

Sworn to before me this 24th day of October, 1866, by Thomas P. Morgan, one of the firm of Morgan & Rhinehart.

ISAAC BROOKS, JR.,
U. S. Commissioner.

13 *Stipulation.*

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

Be it remembered that on this twenty-fourth day of October, in the year of our Lord one thousand eight hundred and sixty-six, before me, Isaac Brooks, jr., a commissioner appointed by the circuit court of the United States for the fourth circuit in and for the Maryland district, pursuant to the act of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," appears Thomas P. Morgan, Capt. W'm Applegarth, Henry Kelsey, Frank Clark, and George F. Needham, of the district aforesaid, in their proper persons, and submit themselves to the jurisdiction of the district court of the United States for the district of Maryland, and consent to bind themselves, their heirs, executors, and administrators, to be bound in the sum of twelve thousand six hundred and thirty-seven dollars, for the claimants of the steamer General Custer, unto James F. Pendergast, Charles H. Pendergast, & Henry A. Fenwick, to perform and fulfil the final order and decree of the said dis-

trict court, and in case of an appeal from such final order and decree of the said district court, then the final order and decree of the circuit court of the United States for the fourth circuit in and for the Maryland district, and in case of an appeal from such final order and decree of the said circuit court, then the final order and decree of the Supreme Court of the United States, in a certain cause now pending in the said
14 district court, wherein the said James F. Pendergast, Charles H. Pendergast, & Henry A. Fenwick are libellants, and the claimants of the said steamer General Custar are respondents, and unless they do so, they severally consent that execution shall issue against them, their heirs, executors, and administrators, their goods, chattles, lands, and tenements, wheresoever found or to be found.

Acknowledged before—

ISAAC BROOKS, JR.,
U. S. Commissioner.

[U. S. 5-cent int. rev. stamp.]

On examination of the parties stipulating, under oath, the bond is satisfactory.

ISAAC BROOKS, JUN.

Decree.

In the district court of the United States for the district of Maryland.

JAMES F. PENDERGAST, CHARLES H. PENDERgast, & Henry A. Fenwick
vs.
STEAMER GENERAL CUSTAR.

This cause standing ready for hearing, & the proceedings, evidence, and arguments of the proctors on each side having been read, heard, & duly considered, & it appearing to the satisfaction of the court that the sum of six thousand four hundred & ninety-six dollars and sixty-three cents ($6,496 63) is due to the libellants, it is thereupon, this nineteenth day of December, 1866, adjudged, ordered, and decreed that Thomas P. Morgan, William Applegarth, Henry Kelsey, Frank Clark, & George F. Needham, the stipulators in the above cause, pay to the said libellants, James F. Pendergast, Charles H. Pendergast, & Henry A. Fen-
15 wick, within twenty days from the date of this decree, the said sum of six thousand four hundred and ninety-six dollars sixty-three cents, ($6,496 63,) with interest thereon from the date hereof, & costs.

WILLIAM F. GILES.

From which said decree so as aforesaid passed the said claimants of the said steamer General Custar, and the said stipulators, by Robert J. Brent, esquire, their proctor, in open court here, have prayed an appeal to the circuit court of the United States for the fourth circuit, in and for the Mary district, to be held at the city of Baltimore, on the first Monday in April next, and to them it is granted.

Thereupon it is ordered by the court here that the record and proceedings aforesaid, with all things relating thereto, be transmitted to the said circuit court, and the same are hereby transmitted accordingly.

Appeal bond.

Know all men by these presents that we, William Applegarth, Frank

Clark, John A. Applegarth, Asa Needham, & James Murray, are held and firmly bound unto James F. Pendergast, Charles H. Pendergast, & Henry A. Fenwick in the sum of thirteen thousand ($13,000) dollars, to be paid them, their executors, administrators, and assigns; to which payment well & truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, dated this 24th day of December, A. D. 1866.

16 Whereas the district court of the United States for the district of Maryland has entered a decree, bearing date 19th day of December, 1866, that the aforesaid obligees should recover from Thomas P. Morgan, William Applegarth, Henry Kelsey, Frank Clark, & Geo. F. Needham the sum of six thousand four hundred & ninety-six $\frac{63}{100}$ dollars, in a certain cause wherein the said obligees are libellants, & the said Thomas P. Morgan & George Rhinehart were claimants of the steamer "Gen'l Custer," her tackle, apparel, and furniture; & respondents, the said Applegarth, the said Kelsey, the said Frank Clark, & said G. F. Needham, were stipulators; & whereas all the said parties against whom the said decree was rendered have appealed therefrom to the circuit court of the United States for the district of Maryland:

Now, therefore, the condition of the above obligation is such, that if the above-named appellants shall prosecute their appeal with effect, & pay all such costs, damages, & expenses decreed against them by the said circuit court in case they fail to make their appeal good, then this obligation to be null & void; otherwise to remain in full force & effect.

Witness our hands & seals this 24th day of December, 1866.

W. APPLEGARTH.	[SEAL.]
FRANK CLARK.	[SEAL.]
JOHN A. APPLEGARTH.	[SEAL.]
ASA NEEDHAM, JR.	[SEAL.]
JA'S MURRAY.	[SEAL.]

Signed & sealed in presence of—
J. L. BRENT.

17 Bond approved 24th Dec'er, 1866.

WILLIAM F. GILES.

In testimony that the aforegoing is a true copy taken from the record and proceedings of the district court aforesaid, I have hereunto subscribed my name and affixed the seal of the said district court this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and sixty-seven.

[SEAL'S PLACE.] JAMES W. CHEW,
Clerk District Court.

[U. S. 5-cents int. rev. stamp cancelled.]

Agreement.—Filed 3rd April, 1867.

In the circuit court of the United States for the Maryland district.

PENDERGAST, FENWICK & Co.
vs.
STEAMER "GENERAL CUSTER,"—THOMAS P. Morgan, & E. G. Comstock, claimants. } Appeal in admirality.

It is admitted that on the 22nd day of May, 1866, Lester D. Fuller caused to be issued out of the superior court of Baltimore City an attachment against the above-named claimants, as non-residents of the

State of Maryland, to recover the sum of $1,800, due on a note of said claimants, which had matured on the 29th of April preceding; and on the 22nd of May the said Fuller also caused to be issued out of the said court an attachment against the said claimants & Rhinehart,
18 as non-residents of the State of Maryland, to recover the sum of $6,360, with interest thereon, the amount of a note of theirs which had fallen due on the 30th of March preceding and that in pursuance of said writs the sheriff of said city took possession of the steamer "General Custer," & that on the 2nd of June William Clark also caused to be issued out of the superior court an attachment against the said claimants, to recover the amount of $3,002 25, due on a promissory note of theirs which had matured on the 29th of May preceding, & that said attachment was also levied on said steamer; that on the 14th of June, 1866, while said steamer was so in possession of said sheriff, under said writs, the libellants instituted an action in personam against the said claimants, & caused an attachment founded thereon to be issued against them, as non-residents of the State of Maryland, to recover the sum of $5,406 09, with interest from May, 1866, which is a part of the same claim as that which the libel in this cause was filed to recover, & that the attachment issued thereon was levied on said steamer then in possession of said sheriff; that the said claims of Fuller & Clark were subsequently settled, & by their order the attachments issued on their suits were dismissed; that subsequently, on the 27th of October, 1866, the said claimants appeared to the said action of Pendergast, Fenwick & Co., against them in the superior court, filed a bond for dissolving said attachment; that said attachment was duly dissolved, & the possession of said steamer surrendered by said sheriff; that the above-named claimants, for the purpose of preventing the marshal from seizing said steamer, under the libel filed in this cause, & the
19 accrual of unnecessary costs, which would result therefrom, made claim to said steamer, & executed and caused to be filed in this cause the stipulation which is filed therein, as if said steamer were in the possession of the marshal under the writ from this court. It is further admitted that said action of Pendergast, Fenwick & Co. against the said claimants is still pending, and undecided in the superior court of Baltimore City; and that the claim sought to be recovered in said attachment of Pendergast, Fenwick & Co. is the same as that sought to be recovered in this proceeding, except so far as the account is altered by debits and credits since the issue of said attachment.

R. J. & J. L. BRENT, *Proctors for Appellees.*
WALLIS & THOMAS, *For Appellants.*

Copy enrollment steamer Gen'l Custer.

FORM C.

Copy enrollment.

No. 31.—Enrollment in conformity to an act of Congress of the United States of America, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," approved February 18, 1793, and of "An act to regulate the admeasurement of tonnage of ships and vessels of the United States," approved May 6, 1864.

20 Thomas P. Morgan and E. G. Comstock, of Washington, D. C.,

having taken or subscribed the oath required by the said act, and having sworn that they are citizens of the United States, sole owner of the ship or vessel called the Gen'l Custer of Georgetown, D. C., whereof E. G. Comstock is at present master, and as he hath sworn is a citizen of the United States, and that the said ship or vessel was built, time and place unknown, purchased by the present owners from the government, name changed from "Mystic" to "Gen. Custer" by authority of the Secretary of the Treasury; and Henry Wingate having certified that said ship or vessel has two decks and three masts, and that her length is one hundred and fifty-six $\frac{6}{10}$ feet, her breadth twenty-four feet, her depth eleven $\frac{3}{10}$ feet, her height — feet; that she measures four hundred and fifty nine tons and seventy-nine hundredths, viz:

	Tonnage.	$\frac{1}{100}$
Capacity under tonnage deck	260	69
Capacity between decks above tonnage deck	199	10
Capacity of enclosures on the upper deck	—	—
Total tonnage	459	79

and that she is a steamer, has — and no figure-head; and the said E. G. Comstock having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said acts, the said steamer has been duly enrolled at the port of Georgetown, D. C.

Given under my hand and seal, at the port of Georgetown, D.C., this first day of July, in the year one thousand eight hundred and sixty-five.

21 W. H. CRAIG,
Deputy Collector.

CUSTOM-HOUSE, GEORGETOWN, D. C.,
January 24th, 1868.

It is hereby certified that the annexed is a true copy from the records of this office.

Witness my hand and seal the day and year above written.

J. L. PARKHURST, [SEAL'S PLACE.]
D'y Collector.

Agreement as to testimony.

In the Supreme Court of the United ——

JAMES F. PENDERGAST & OTHERS
vs.
OWNERS & CLAIMANTS OF, AND STIPULATORS for, the steamer General Custer.
} Appeal from the fourth circuit.

The testimony in this case being the same as, and having been taken in connection with, that taken in the case of the above-named appellants, against the owners and claimants of, and stipulators for, the steamer Kalorama, on the decree, in which case an appeal has also been entered, it is hereby agreed that said testimony need not be copied into the record in this case, but may be referred to from the record in the case against the owners & claimants of, and stipulators for, the steamer Kal-

orama, as if it been copied into & formed a part of the record in this case.

22

WALLIS & THOMAS,
Att's for Appellants.
JNO. M. FRAZIER,
For Appellees.

And afterwards, to wit, on the 17th day of November, in the year of our Lord 1868, the circuit court here made and passed the following decree, to wit:

In the circuit court of the United States for the 4th circuit in and for the Maryland district.

OWNERS & CLAIMANTS OF STEAMER GENERAL Custar
vs.
JAMES F. PENDERGAST, CHARLES H. PENDERgast, & Henry A. Fenwick.
} In admiralty.

On appeal from decree of the district court.

This cause coming on to be heard on appeal, & the same being submitted on the proofs filed herein & on the argument of the proctors for the respective parties, it is hereby decreed that the decree of the district court herein be reversed, with costs, and that the libel of the libellants be dismissed with costs.

S. P. CHASE,
Ch. Jus. U. States.

From which said decree, so as aforesaid passed, the said James
23 F. Pendergast, Charles H. Pendergast, and Henry A. Fenwick prayed an appeal to the Supreme Court of the United States, to be held at the city of Washington, on the first Monday in December next; and to them it is granted.

Appeal bond.—Filed 28th November, 1868.

Know all men by these presents that we, Henry A. Fenwick and S. Hamilton Caughy, are held and firmly bound unto Thomas P. Morgan, William Applegarth, Henry Kelsey, Frank Clark, and George F. Needham in the full and just sum of five hundred dollars, lawful money of the United States, to be paid to the said Thomas P. Morgan, William Applegarth, Henry Kelsey, Frank Clark, and George F. Needham, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made and done, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this 27th day of November, in the year of our Lord one thousand eight hundred and sixty-eight.

Whereas at the district court of the United States in and for the district of Maryland, James F. Pendergast, Charles H. Pendergast, and Henry A. Fenwick, trading under the firm name and style of Pendergast, Fenwick & Company, did file their libel against the steamer "General Custer," her tackle, furniture, &c.; and whereas the said

Thomas P. Morgan, William Applegarth, Henry Kelsey, Frank Clark, and George F. Needham did enter into a stipulation whereby they became substituted for said steamer, &c.; and whereas the said district
24 court as aforesaid did, on the nineteenth day of December, in the year one thousand eight hundred and sixty-six, decree that the said stipulators should pay unto the said James F. Pendergast, Charles H. Pendergast, & Henry A. Fenwick, libellants as aforesaid, the full and just sum of six thousand four hundred and ninety-six dollars and sixty-three cents, and costs, to be paid within twenty days; and whereas the said Thomas P. Morgan, William Applegarth, Henry Kelsey, Frank Clark, and George F. Needham, stipulators as aforesaid, did, on the twenty-fourth day of December, eighteen hundred and sixty-six, appeal from said decree of the district court as aforesaid, to the circuit court of the United States for the fourth circuit and district of Maryland; and whereas the said decree of the district court was by said circuit court reversed, and the libellants as aforesaid were decreed to pay the costs of the suit as well in the said circuit court as in the district court aforesaid; and whereas the said James F. Pendergast, Charles H. Pendergast and Henry A. Fenwick have appealed from the said decree of the said circuit court to the Supreme Court of the United States, to be held at Washington, in the District of Columbia, to the end that said Supreme Court may pass judgment whether said last-mentioned decree shall be reversed:

Now, the condition of the aforegoing obligation is such, that if the said James F. Pendergast, Charles H. Pendergast, and Henry A. Fenwick shall well and truly prosecute with effect this said appeal, and pay unto the said Thomas P. Morgan, William Applegarth,
25 Henry Kelsey, Frank Clark, and Geore F. Needham, their heirs, executors, administrators, and assigns, their costs and charges aforesaid adjudged unto them by the said circuit court, and also all such costs and charges as may be awarded unto them by the said Supreme Court, in case they, the said James F. Pendergast, Charles H. Pendergast, and Henry A. Fenwick shall fail to make good their said appeal, then the above obligation to be void and of none effect; otherwise to be and remain in full force and virtue in law.

H. A. FENWICK. [SEAL.]
S. H. CAUGHY. [SEAL.]

Signed, sealed, & delivered in the presence of—
M. R. WALTER.

Which said bond is thus endorsed, to wit:

Bond approved 28th November, 1868.

WILLIAM F. GILES.

Thereupon it is ordered by the court here that the record and proceedings aforesaid, with all things concerning the same, be transmitted to the said Supreme Court, and the same are transmitted accordingly.

In testimony that the aforegoing is a true copy taken from the record and proceedings of the circuit court aforesaid I have hereunto
26 subscribed my name and affixed the seal of the said circuit court this fifth day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

[SEAL.]

JAMES W. CHEW,
Clerk Circuit Court.

(Indorsement on cover:) No. 261. James F. Pendergast, Charles H. Pendergast, & Henry A. Fenwick, appellants, vs. the Owner and Claimant of the Steamer General Custer. Maryland C. C. U. S.
Filed 30th September, 1869.

In the Supreme Court of U. S.

No. 260.

JAMES F. PENDERGAST AND OTHERS,

vs.

THE STEAMER KALORAMA.

No. 261.

SAME,

vs.

THE STEAMER GENERAL CUSTER.

APPELLANTS' BRIEF AND POINTS.

S. TEACKLE WALLIS,
JOHN H. THOMAS,
Atts. for Appellants.

Meurer & Co. Printers and Stationers, 167 Baltimore street, Baltimore

In the Supreme Court of the U. S.

No. 260.

JAMES F. PENDERGAST AND OTHERS,

vs.

THE STEAMER KALORAMA.

No. 261.

SAME,

vs.

THE STEAMER GENERAL CUSTER.

APPELLANTS' BRIEF AND POINTS.

These are appeals from Decrees of the Circuit Court for the Fourth Circuit, reversing decrees of the District Court against the above named steamers, respectively, for balances due on advances made to them by the Appellants, in the Port of Baltimore, both of said steamers having belonged to and been registered in the Port of Georgetown, D. C., and having been owned by non-residents of Maryland, at the time said advances were made. The appeals were taken at the suggestion of the Chief

Justice from his own decrees. He thought a literal construction of the language used by this Court in the cases of the Sultana and the Laura, made it his duty as a Circuit Judge, to reverse the decrees of the District Court. But he also thought that the Supreme Court did not intend to establish the law which that language seemed to announce, and he thought that considered in connection with the facts of the cases in which it was used, it was susceptible of a different interpretation, and that this Court, in cases which had been argued and were then pending before it, involving the same point, might give to it an interpretation, and that he as a Judge of this Court, might himself feel at liberty to give to it an interpretation, as he has since done in the case of the Grapeshot, which would necessitate the reversal of his own decrees and the affirmance of those of the District Court.

The two cases being dependant upon precisely the same state of facts, the testimony was all taken together, and by agreement of counsel is copied only in the record of No. 260.

See pages 11, 12 of Record, No. 261.

They involve precisely the same points. It is presumed that the Court will consider them proper to be argued together, and that one set of briefs will suffice for the two.

The two steamers were put upon a line between Baltimore and Charleston, under an agreement at first made in reference to two trial trips of the General Custer, and afterwards adopted and continued in reference to them both, except as to a provision for a purchase.

This agreement, so far as it affects the points now at issue, was that the Appellants were "to charge 10 per cent. commissions on the gross freights and to disburse the steamers, and have all freights and disbursements insured."

See letter on page 12; and see also pages 9 and 76.

When the steamers arrived in Baltimore, from New York, they were subject to certain maritime liens, which the Appellants paid, at the request of the owners.

See testimony of Charles H. Pendergast, p. 72.

H. H. Fenwick, p. 19, and his cross-examination, p. 20.

All the other items of the accounts were for the running expenses in their contemplated trips, except $2,000 advanced to each, upon two separate drafts of Morgan, who was sole owner of one steamer and managing part owner of the other, to pay off liabilities of the steamers.

(In reference to the drafts, see the drafts themselves, p. 18 and 19, and the testimony of James F. Pendergast, p. 11.)

Another draft of for $2,500 was charged in the detailed account of the General Custer, under date of April 19th, (see page 23); but that charge is cancelled by a corresponding credit of the same date. (See page 28). That item therefore does not appear on either side of the account which was filed with the libel, and is practically out of the case.

The other bills constituting said accounts were either for wages of the crew or for supplies ordered by the master of the particular ship against which they are charged, or by some other officer acting under his immediate supervision, whose orders he afterwards recognized and adopted, and all were required to be attested by him before they were paid.

James F. Pendergast, p. 9, 10.

John D. Agnew, 55.

The advances were all made upon the credit of the respective steamers, and would not have been made and could not have been procured otherwise than on their credit.

See testimony of James F. Pendergast, p. 10.
" " " Henry A. Fenwick, p. 9, 19.
" " " Charles H. Pendergast, p. 46, 72.
" " " John D. Agnew, p. 51.
Admission, p. 89.

It was expressly agreed when the steamers were put into the appellants' hands that they were to have a lien on them for all of their advances—and that they were to insure that lien, for in no other sense can the agreement to insure disbursements be understood. (See Charles H. Pendergast's testimony, p. 72; letter, p. 12.)

These advances were repeatedly recognized by Morgan as liens on the ships, while the bills were accruing and afterwards.

See Fenwick, p. 19, 20.
Charles H. Pendergast, p. 46.
Agnew, p. 51, 54, 55.

The correctness of the accounts was not disputed at the trial, in either of the Courts below. The only defence was that they were not liens on the vessels.

The correctness is abundantly proven:

See testimony of James F. Pendergast, p. 9, 10.
" " " H. A. Fenwick, p. 19, 20.
" " " Charles H. Pendergast, p. 46.
" " " John D. Agnew, p. 51.

Morgan & Comstock, the parties who contracted with the Appellants, were both examined as witnesses, and neither of them pointed to an exceptionable item.

Morgan admitted the accounts to be correct after full examination of them and the vouchers on which they were founded.

See testimony of Charles H. Pendergast, p. 47.
" " " John D. Agnew, p. 50, 55.

They endeavored, by testimony, to lay the foundation for arguing, but counsel did not argue at the trial, that they had been deceived into believing, that the steamers were making, instead of losing money. It was clearly shown that Morgan had as good an opportunity as the Appellants of knowing the results of the adventure—that the Appellants had offered to stop the running of the steamers until the accounts could be accurately made up and the results definitely ascertained—but that the owners, calculating on large profits in the future, objected, and that Morgan, in spite of the protest of the Appellants, ran off with the General Custer, while she was in the custody of the sheriff under an attachment, and caused her to make her final and most disastrous trip.

Charles Pendergast, p. 47.
James F. Pendergast, p. 70.
Agnew, p. 71.

The Appellees attempted to show by the testimony of witnesses, nearly all of whom were stipulators against whom the decrees had been rendered, that the owners of the steamers could, at the time of the advances, have procured them on their individual credit. But they all admitted that they knew nothing about the individual credit of Morgan, Comstock, or Rhinehardt. They had only dealt with and knew of the firm of Morgan, Rhinehardt & Co., and had never trusted it except for work done on steamers not belonging to the port of Baltimore, and for which the law gave them a lien. Nearly all of them still

had unpaid claims and knew no means of realizing them, except out of the interest some of the members of that firm had in the steamers General Custer and Kalorama.

See testimony from pages 80 to 83 inclusive.

The Steam Tug Tempest was attached for a debt due by that firm while she was undergoing repairs at the ship yard of Fardy & Brother, in whose employment one of these witnesses, Uniack, was.

See Uniack's testimony, p. 81.

Another of these witnesses, Applegarth, had a draft of theirs for $150, which he was unable to collect. He was unable to negotiate another draft of theirs for $2,500, to pay the costs of an attachment which had been issued against them by Fuller, so as to release the vessels by a bond, which Applegarth and others were willing to give upon obtaining a mortgage of indemnity on these steamers, and which they did eventually give on that security.

See Applegarth's cross examination, p. 84.

These facts, proven by the Appellees' own witnesses, seem to demonstrate the want of credit on the part of the owners rather than the existence of it. The other proof in the cases leaves no room for doubt on that point. Attachments were issued against them on promissory notes which had nearly matured when the steamers came into the Appellants hands, and were actually dishonored before any of the money except a few dollars was advanced.

See admission, p. 88.

The proof shows that the libellants were obliged to make advances when the steamers first came into their hands, to release them from liens then existing against them, for wages, and repairs and supplies.

See testimony of Charles H. Pendergast, p. 72.

" " " H. A. Fenwick, p. 19, and cross examination, p. 20.

1 Black & Blow 90

Apart from these facts, from which the inference would seem irresistible, that the owners had no personal credit in Baltimore, the direct testimony on that point is full and positive. It, at all events, shows that the Appellants had no reason to suppose that the advances could be obtained on personal credit and that they in fact relied on the security of the ships.

See the testimony of James F. Pendergast, p. 10.
" " " Henry A. Fenwick, p. 19.
" " " Charles H. Pendergast, p. 46, 72.

POINTS.

The Appellants will contend that:

1. There was an express agreement for liens as security for all the items of the accounts.

See testimony of Charles H. Pendergast, p. 72.

The stipulation that the Appellants should insure their disbursements meant that they should insure their liens on the ships for such disbursements. In no other sense could they insure disbursements. Admiralty courts enforce express, as well as implied liens, if the contracts are of a maritime character.

The Grapeshot, 9 Wallace, 129.

2. If there were no such express contracts, implied liens arose from making the advances under the circumstances proven.

The Grapeshot, 9 Wallace, 129.

3. If there are items in the accounts which can not be maintained as maritime liens, the credits more than extinguish them, leaving a balance due for claims of an unquestionably maritime character. The law, in that event, ought to appropriate the credits to the most precarious debts—to those which are unsecured—leaving still due the balances for which there are maritime liens.

2 Greenleaf on Evidence, sect. 533.
Field v. Holland, 6 Cranch, 8, 27, 28.

4. The attachments issued out of the Superior Court of Baltimore City, were proceedings *in personam*, and no bar to the right to maintain these libels *in rem*. Creditors making advances to ships in a foreign port are entitled to three-fold remedies—against the ship—the master—and the owners. These are cumulative, not alternative, and may all be pursued simultaneously.

Certain Logs of Mahogany, 2 Sumner, 589, 91.
The Paul Boggs, 1 Sprague, 369.
Harmer v. Bell, 22 English Law and Equity, 70.

S. TEACKLE WALLIS,
JOHN H. THOMAS.
Atts. for Appellants.

5. The fact that the owner was in Baltimore when some of the debts were contracted and that he ordered some of the articles from which they arose, did not prevent the accrual of a lien therefor.

The Steamer James Guy, 1 Benedict, 112.
Young Fall vs. The James Guy, 5 Int. R. R., 109.
The Hilarity, 1 Blatch. & Howl., 71.

In the case of the Sultana the lien was refused on other grounds, which would not have been alleged, if the fact of the articles having been ordered by or in the presence of the owner had been sufficient objection.

Pratt vs. Reed, 19 How., 359.
The Grapeshot, 9 Wallace, 137.

6. The reduction of the amount in dispute by recoveries from other sources since the appeal does not affect the jurisdiction of this Court.

Cook vs. U. S., 2 Wallace, 218.

In the Supreme Court of U. S.

No. 260.

PENDERGAST.

vs.

STEAMER KALORAMA.

No. 261.

PENDERGAST,

vs.

STEAMER GENERAL CUSTER.

BRIEF FOR APPELLEES.

WM. SHEPARD BRYAN,
For Appellees.

Murray & Co. Printers and Stationers, 182 Baltimore street, Baltimore

Supreme Court of the United States.

No. 260.

PENDERGAST,

vs.

STEAMER KALORAMA.

No. 261.

PENDERGAST,

vs.

STEAMER GENERAL CUSTER.

BRIEF FOR APPELLEES.

These were appeals from the Circuit Court of the United States for Maryland.

The appellants filed libels in the District Court against the steamers in question, in which they claimed admiralty liens for advances made on the credit of said steamers, to procure necessary supplies and repairs.

The evidence was the same in both cases, and they were heard together.

The District Court sustained the liens; on appeal the Circuit Court reversed the decree of the District Court and dismissed the libels.

One Comstock who was part-owner of the General Custer and agent for the other owners, made a written agreement with Pendergast, Brothers & Co., which is contained in the two letters on pages 11 and 12, of the written record. By this agreement the Pendergasts were to take the General Custer for two voyages to Charleston or Savannah and back, as they should decide through their Baltimore house, Pendergast, Fenwick & Co., and if they were then satisfied with the vessel, they were to purchase her.

For the two voyages they were to charge ten per cent. commission on the gross freights of the vessel, and to disburse the steamer, and to have all freights and disbursements insured; and in case the vessel was not satisfactory after a trial of two trips, the Pendergasts were to retain her in the Southern trade on the same terms. They were also to insure at lowest rates.

The Kalorama was taken under the same agreement and understanding as the General Custer. This agreement was made by Morgan, her owner. (J. Pendergast's testimony, page 10, and Morgan's testimony, pages 75 and 76.) The vessels were placed in the hands of the appellants under this agreement, and employed in a line of steamships run by them. Money was advanced by them for necessary supplies and expenses, which it is alleged amount to the sums claimed in the libels, after deducting the earnings of the steamers received by them.

The items of the claim are set out in detail in the various accounts in the record, (pages 22–45.) Among other charges are those for the commissions on the freights received by the appellants and for insurance.

The evidence shews that the captain, officers and crew were employed by the appellants during the time they had charge of them. (Morgan's testimony, page 75, and C. Pendergast's testimony, page 49.) McClanahan (page 74,) Morgan (page 75,) Savage (page 77,) Comstock (page 79,) testify that the appellants

were instructed not to run the boats if they were not paying expenses. The appellants and Agnew, their clerk, testify that the advances were made "on the credit of the ships;" or "on the credit of the ships and owners."

Uniack (page 81,) Tall (page 82,) Applegarth (page 83,) Clark (page 84,) Murray (page 86,) prove the excellent credit of the owners in the city of Baltimore during the time the advances were made. The business of these witnesses connected them with the furnishing of supplies and repairs to steamships.

Uniack was superintendent for Fardy & Brother, who, according to the testimony of C. Pendergast (page 72,) put extensive repairs on the Kalorama.

No statement of account was furnished to the owners until July, 1866, (pages 50 and 55.)

Before this time (June 14th) the vessels had been attached by the appellants in the State Court. (Agreement of Counsel, page 88, in Kalorama case, and page 10 in Cluster case.)

Morgan had all along been informed by appellants that they were making money. (Page 75.)

Morgan testifies that the repairs were charged to the owners, and were not paid for by the appellants; also, that the repairs and supplies were ordered partly by him and partly by the appellants. (Page 75.)

Agnew testifies (page 55) that the work was done and supplies furnished on written orders from the office (meaning the office of appellants.) C. Pendergast testifies to the same effect (pages 72 and 73.)

The libels charge that the advances were made for supplies and repairs; both the Pendergasts so testify (pages 9, 72 and 73,) although C. Pendergast (page 73) on cross-examination says the repairs were slight. It is a little singular that on examining the items of the accounts no charge for repairs can be found.

N. B. Actions *in personam* were brought in the State Court against the owners to recover that portion of the amounts claimed in these libels which accrued before June 14th, 1866,

(Record No. 260, page 88, Record No. 261, page 10.) These actions were ultimately decided in favor of these appellants, and the amounts recovered, being more than eleven thousand dollars, have been paid to them since this appeal was taken. (Agreement of Counsel made since the Record was printed.) The amount in controversy has thus been reduced to something over a thousand dollars, in round numbers, in each case.

POINTS.

The evidence to establish the amount of the advances is of a hearsay character to a considerable extent; but even if the amount be correctly stated, it is a personal debt, and not a lien on the steamers.

First. The advances were made in pursuance of a contract entered into with the owners personally. By this contract the appellants assumed entire charge of the steamers for a series of voyages, and were to receive the specified compensation of ten per cent. commission on the gross freights. They became the agents of the owners; freighted the ships, collected the freights, and paid their expenses.

James Pendergast speaks of it as an "enterprise" in which Pendergast, Fenwick & Co. were engaged. (Page 10.) He also speaks of his firm as the "agent" of the owners. This agent appointed captain, officers and crew, ordered supplies, and stood in the place of owners generally. As said by this Court on a similar occasion: "There is nothing in the nature of a maritime nature in the case."

Minturn vs. Maynard, 17 Howard, 477.
See also Ward vs. Thompson, 22 Howard.

Second. The claim maintained in the libels is for a tacit or implied hypothecation.

All the authorities shew that no one but the master can create these liens. The owner himself cannot do it, except where he also sustains the character of shipmaster or captain. This is established in the St. Jago de Cuba, 9 Wheaton, 409–416; and is not controverted in any of the subsequent cases.

It is declared both in the opinion of the Court and in the dissenting opinion, in Thomas vs. Osborn, 19 Howard; and seems to be assumed as settled law in the Grapeshot.

In the present cases, the owners specially contracted with the appellants that they should make the disbursements.

The contract contemplated a series of voyages, and provided a large compensation to the appellants, to be paid out of the freights coming to their hands. Everything was defined, and nothing left to implication.

Third. The Captain seems to have had nothing to do even with ordering the supplies for which the appellants had contracted to make the necessary advances. Agnew and Charles Pendergast say the supplies were ordered by the appellants. Morgan says they were ordered sometimes by the appellants, and sometimes by himself. James Pendergast is the only witness, who says they were ordered by the captain. The captain was appointed by the appellants, and was under their control, and naturally would not assume to make any contracts for supplies when they were present.

Fourth. The whole history of these transactions shews that the appellants were what James Pendergast described them to be, to wit: agents of the owners. Their claim is the ordinary one of an agent against a principal for a settlement of accounts. The remedy is by action of assumpsit and not in Admiralty.

Fifth. The testimony of the appellants and their clerk that the indebtedness was contracted on the credit of the ships can-

not avail. The original contract is in evidence shewing the contrary. McClanahan (page 74), Morgan (page 75), Savage (page 77) and Comstock (page 79), shew that it was against the instructions of the owners that the vessels were run if they were not paying expenses. Moreover, James Pendergast testifies (page 70) that he did not know that they were not paying expenses. The principal then gave instructions that the debt should not be incurred, and the agent did not know that it had been incurred. And yet the agent says that the principal pledged the credit of the ships to secure it.

But even if the owners had made any such contract, it could not be enforced in Admiralty.

Sixth. If the other circumstances in evidence favored the implication of a lien on the ships it would be repelled by the proof shewing the excellent credit of the owners at the time and place where the advances were made and the fact that the appellants must have known it. Charles Pendergast had a conversation on the subject of the repairs of one of these steamers with one of the firms, which were willing to give the owners any amount of credit. (Page 72.)

WM. SHEPARD BRYAN,
For Appellees.